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Supreme Court of the United States

October Term, 1970

No. 1157

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

RUSSELL JUDAS NELSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

October Term, 1970

No. .....

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

RUSSELL JUDAS NELSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

James D. Cox, Superintendent of the Virginia State Penitentiary, successor to C. C. Peyton, deceased, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit entered on October 6, 1969 in the case of *Russell Judas Nelson* v. *C. C. Peyton, Superintendent of the Virginia State Penitentiary*. On October 14, 1969, the mandate in the case was stayed upon application of the Superintendent.

OPINIONS BELOW

The memorandum order of the Supreme Court of Appeals of Virginia in the case of *Nelson* v. *Peyton*, decided

on October 10, 1967, is unreported; it has been included herein as Appendix I (App. p.. 1). The memorandum decision and order of the United States District Court for the Eastern District of Virginia, Richmond Division, both entered September 26, 1968, are not reported, but are included herein as Appendices V and VI (App. pp. 50-57).

The opinion of the Court below is reported at 415 F.2d 1154, but is also found in this brief as Appendix XI (App. pp. 62-70). On October 6, 1969, the Court denied—with some dissent—a motion for rehearing en banc. See Appendix XII (App. pp. 71-72).

THE JUDGMENT

On October 14, 1969, an order was entered in the United States Court of Appeals for the Fourth Circuit staying the issuance and transmission of a certified copy of the judgment of that Court in the premises to permit the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court. Upon application of counsel for petitioner, the time for filing a petition for writ of certiorari in the above entitled cause was extended to and including February 7, 1970 by order of this Honorable Court of December 19, 1969.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the Court below err in elevating a recently preferred federal procedural practice to the level of a constitutional mandate applicable to state convictions and appeals?

STATUTES INVOLVED

I

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646. 62 Stat. 967." (28 U.S.C., § 2254)

II

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C. § 1254)

STATEMENT OF THE CASE

On November 29, 1951, Russell Judas Nelson, Respondent, was convicted in a Virginia court for robbery and sentenced to a term of eight years. After serving less than three years of that sentence, Nelson was paroled. On January 20, 1956, less than two years from the date of his parole, Nelson was convicted in Virginia for another felony, grand larceny, for which he was sentenced to serve a term of two years. He was discharged from all felony sentences on March 3, 1960 (App. pp. 9-11).

Two years later, November 27, 1962, in the Hustings Court of the City of Richmond, Nelson was convicted for robbery and attempted rape for which he received a total term of twenty-five years. (An additional ten-year sentence was imposed on December 27, 1962, for recidivism—third conviction.) (App. pp. 9-11)

At the conclusion of Nelson's trial on November 27, 1962, for robbery and attempted rape, he neglected to express a desire to appeal his convictions (App. p. 24). He did not request his two attorneys to appeal nor did he attempt to contact counsel after trial with regard to his sentences (App. pp. 22, 24). Four years later, on December 7, 1966, Respondent was accorded a hearing in the Hustings Court of the City of Richmond upon a petition for a writ of habeas corpus with regard to his 1962 convictions (App. pp. 13-50). His trial attorneys testified at that hearing that there was an "extremely strong" case against Nelson (App. pp. 33, 39) and that after trial no appeal was mentioned by him nor was there any indication from him of a desire to appeal the case (App. p. 38). Nelson did state at the state hearing that, subsequent to his conviction, he had written the trial judge and "told him about my trial" (App. p. 24). A Court official testified that there were no letters to the trial judge in the records pertaining

to Respondent's convictions (App. pp. 47-48). This conflict in the evidence was resolved by the State Court against Nelson and by order of December 13, 1966, the habeas corpus petition was denied and dismissed. The judgment was affirmed by the Virginia Supreme Court of Appeals on October 10, 1967 (App. p. 1).

On December 26, 1967, Respondent Nelson filed in the United States District Court for the Eastern District of Virginia, Richmond Division, a habeas corpus petition in which he alleged that he had been denied the effective assistance of counsel. On September 26, 1968, upon review of the State Court records, the District Court agreed that there was no evidence that Respondent had been dissatisfied with the result of his trial or that he had desired an appeal (App. p. 53); nevertheless, the District Court concluded that Nelson had been denied an appeal (App. pp. 50-57, 60). The District Court ignored not only the law of Virginia, but also, at the time, the rule of the Fourth Circuit. In effect, the opinion stated that what is not constitutionally required of the Federal Courts may be declared as a constitutional mandate binding upon the States.

Upon appeal the opinion of the District Court was affirmed; the Fourth Circuit, in an opinion by a panel of three judges, reversed its previous rulings upon which many State and Federal Courts had relied. It stated that upon conviction defendant's counsel, in order to avoid the charge of ineffective assistance of counsel, must advise the defendant of his right of appeal, notwithstanding the defendant's previous—and sometimes numerous—courtroom experiences and knowledge (App. pp. 62-72).

ARGUMENT

The Ruling Of The Court Below Is Contrary To State And Federal Laws, Statutory And Decisional, Which Treat Advice Regarding Appellate Review As A Rule-Making Problem That Is Not Constitutional In Scope.

This case involves the important question of the extension of the right to appeal concept. Because the scope and breadth of the opinion below is at variance with settled Virginia practice, case law and previous rulings of the United States Circuit Court of Appeals for the Fourth Circuit, upon which courts of Virginia and other jurisdictions have relied, and because it is also in direct conflict with rulings of other Circuit Courts of Appeals,[1] this Honorable Court should grant certiorari in order that this question of imperative legal importance may be settled.

I

In Virginia, there is both a statutory and a constitutional right to appeal from a criminal conviction. *Va. Code Ann.* § 19.1-282 (1960 Repl. Vol.); *Va. Const. Art.* VI, § 88; *Peyton* v. *King,* 210 Va. 194, 169 S.E.2d 569 (1969); *Clark* v. *Peyton,* 207 Va. 444, 150 S.E.2d 533 (1966); *Cabaniss* v. *Cunningham,* 206 Va. 330, 333, 143 S.E.2d 911, 913 (1965).

The right, however, is not unconditional: Upon conviction the defendant must indicate to Court or counsel, in some manner, however halting or inept, that he is dissatisfied with the trial, the sentence imposed, or that he desires an appeal. *Peyton* v. *Webb,* 207 Va. 417, 149 S.E.2d 889 (1966); *Duffield* v. *Peyton,* 209 Va. 178, 162 S.E.2d 915 (1968); *Thacker* v. *Peyton,* 206 Va. 771, 146 S.E.2d 176 (1966).

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[1] See pp. 16-17 *infra.*

In the present case the facts are uncontroverted. At the conclusion of Nelson's trial on November 27, 1962, in the Hustings Court of the City of Richmond, Virginia for armed robbery and attempted rape, his third and fourth felony convictions, Nelson never expressed to anyone a desire to appeal (App. p. 24). Indeed, the Courts below agreed that there was no record that Nelson was dissatisfied with the result of his trial or that he wished to appeal (App. pp. 53, 64).

From these facts the United States Court of Appeals for the Fourth Circuit concluded that Nelson had been denied an appeal. *Nelson* proclaims, for the first time by the Fourth Circuit Court, that one convicted in a *state court* of a felony, regardless of previous "courtroom experience" must be advised by counsel of his right to appeal. In the absence of that advice—or the lack of proof that such advice was imparted—the defendant is entitled to outright release if he cannot be retried or granted a belated appeal.

It is submitted that the Court below has confused notions of preferred practice with the actual mandate of the Federal Constitution. Indeed, the ruling of the Court flies in the face of state and federal laws, statutory and decisional, which treat advice regarding appellate review as a rule-making problem that is not constitutional in scope.

Provisions for appeal in criminal cases in federal courts is of relatively recent origin. *United States* v. *Robinson*, 361 U.S. 220, 226 (1960).[2] This Court, less than three decades ago, promulgated the Federal Rules of Criminal Procedure, pursuant to legislative authorization. It was *not until July 1, 1966,* however, that this Court, *for the first*

[2] A departure from an historical pattern of federal appellate rights and procedure is a matter for legislative decision. Frankfurter and Landis, *The Business of the Supreme Court*, 109-13 (1927); see, also, *Carroll* v. *United States*, 354 U.S. 394, 406 (1957).

time, required *by rule* that affirmative action be taken in federal courts with respect to advising defendants after imposition of sentence of the right of appeal. *Fed. R. Crim. P.* 32(a)(2). Now the Fourth Circuit proposes to elevate this federal *procedural* rule of preferred practice to one of constitutional magnitude and to accord to Nelson a constitutional right to advice in 1961 not guaranteed even then to federal defendants.

Such a strained and anomalous result by that Court ignores its own language uttered just months prior to *Nelson*:

> It is *only in the federal court,* and then only with respect to defendants tried on the plea of not guilty, that the trial judge must advise the defendant of his right of appeal. *Fed. R. Crim. P.* 32(a)(2). *Sand* v. *Peyton,* mem. dec. no. 12,647 at 2 (4th Cir. October 2, 1968). (App. pp. 58-60.)

It also spurns previous language of this Court that:

> . . . the Fourteenth Amendment does not, through its due process clause or otherwise, have the effect of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts. . . . There is nothing in the Fourteenth Amendment specifically stating that the long recognized and then existing power of the states over the procedure of their own courts in criminal cases was to be prohibited or even limited. *Bute* v. *Illinois,* 333 U.S. 640, 656-657 (1948).

This Court for more than a decade has made it clear that differences in access to the *instruments* needed to vindicate legal rights on appeal, when predicated upon the financial situation of the defendant, are repugnant to the Constitu-

tion. *Draper* v. *Washington,* 372 U.S. 487 (1963); *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Long* v. *District Court of Iowa,* 385 U.S. 192 (1966). Those cases, however, involved *demands* by the defendants *for trial documents,* all of which requests were "clear and unequivocal."

This case does not present the question of a Sixth Amendment right to counsel on appeal. Virginia's concern for the appellate rights of all defendants is clearly revealed in the long line of decisions beginning with *Cabaniss* v. *Cunningham, supra*[3]; rather the case involves the right of a state to govern the use—and abuse—of its appellate process, a practice which places an affirmative—but simple—duty upon Virginia defendants to proceed after the state has discharged its heavy burden of proof with regard to guilt and conviction.

All that the law requires is that the defendant give some indication to Court or counsel—however ineptly—that he was dissatisfied with the result, with the handling of the trial or that he desired an appeal. Once the defendant has discharged his affirmative obligation, the right to appeal and appointment of counsel—if indigent—attaches and must be respected. *Cabaniss* v. *Cunningham, supra.*

The Virginia rule is not premised upon the impecunious state of the defendant; it applies in all criminal cases, regardless of economic status or condition.

Indeed, in other cases this Court has not required absolute equality; lines have been drawn and sustained. *Tigner* v. *Texas,* 310 U.S. 141 (1940); *Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *Douglas* v. *California,* 372 U.S. 353 (1963). No less should be done here.

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[3] See, for example, *Ferby* v. *Peyton,* 210 Va. 129, 169 S.E.2d 438 (1969); *Lawrence* v. *Peyton,* 209 Va. 610, 166 S.E.2d 277 (1969); *Via* v. *Peyton,* 208 Va. 387, 158 S.E.2d 127 (1967); *Smith* v. *Peyton,* 207 Va. 515, 151 S.E.2d 382 (1966); *Stokes* v. *Peyton,* 207 Va. 1, 147 S.E.2d 773 (1966).

This Court has recognized, also, that a state may protect itself from frivolous appeals. *Griffin* v. *Illinois, supra,* at 24, which Virginia has attempted to do. *Peyton* v. *Webb, supra.* The rationale of the Virginia rule is understandable:

> To require counsel and/or the Court to advise every defendant of his right to appeal would invite and encourage all persons convicted of a crime to do so regardless of whether he has any meritorious ground for appeal. *Peyton* v. *Webb, supra,* at 422.

Persuasive policy arguments can be made for a more flexible, more desirable rule. But those policy questions, involving, as they do, many conflicting considerations of substance, must be resolved through legislation or the rule-making process and not by judicial decision. Such an approach is evident from a review of the Advisory Committee's notes for amendment of *Fed. R. Crim. P.* 32(a)(2). See 39 *F.R.D.* 69, 193. To rule otherwise is to interfere with state power to obtain what may be a desirable, but not constitutionally required, result.

Post-conviction appellate advice is now afforded federal defendants—not as a matter of constitutional right but of *recent procedural practice. Fed. R. Crim P.* 32(a)(2). If the Fourth Circuit's decision were accepted and extended to its logical conclusion, all defendants would be entitled as a constitutional right to be advised of their right to apply for certiorari to the Supreme Court of the United States and, after that, if unsuccessful, to file petitions for writs of habeas corpus; in *Smith* v. *Warden,* 280 F.Supp. 827 (D. Md. 1968), such a contention was flatly rejected:

> 'This court is aware of no authority which holds that a defendants' constitutional rights have been infringed simply because his counsel has failed to advise him of

> his right to seek a writ of certiorari to the Supreme Court of the United States after his conviction has been affirmed by the highest court of the state. *The duty of counsel* to do so in federal prosecutions in this circuit *is based upon the plan of the Fourth Circuit adopted under the Criminal Justice Act of 1964, and not upon any constitutional provision, statute or general principle of criminal procedure.* (Emphasis supplied.) 280 F.Supp. at 829.

In Maryland the legislature recently specified *by rule* that, effective September 1, 1967, counsel shall advise his client of the right of appeal. *Md. R. Proc.* 719. Prior to such legislative action, the Maryland rule was similar to the present Virginia practice and based upon decisions of the Fourth Circuit before *Nelson. Rayne* v. *Warden,* 198 F.Supp. 552, 555 (D. Md. 1961); *Meadows* v. *State,* 3 Md. App. 441, 239 A.2d 767 (1968); *Clark* v. *Peppersack,* 371 U.S. 848 (1962). Under Indiana practice, counsel, after conviction of his client, is neither obliged nor authorized to proceed without a request by defendant for an appeal. *Victor* v. *Lane,* 394 F.2d 268 (7th Cir. 1968). A similar practice prevails in Idaho. See *Gardner* v. *State,* 91 Ida. 909, 435 P.2d 249 (1967).

In Virginia the State Bar Association proposed in 1969 for adoption by the Supreme Court of Appeals the *Rules of Criminal Practice and Procedure.* Rule 3A:25(f), if adopted, would change current practice regarding appeals:

> *Notification of right to appeal*
>
> After the imposition of sentence on a not guilty plea in a felony case, the Court shall advise the accused of his right to petition the Supreme Court of Appeals for a writ of error and of the right of an indigent to proceed *in forma pauperis* and to have counsel appointed for him.

The treatment of this problem of post-trial appellate advice through the rule-making powers of the federal and state courts makes it clear, then, that no constitutional problem is involved under the facts of this case. The ruling of Fourth Circuit was in error and should be overturned by this Court. The decision represents a total reversal in thinking by the Court below and, if allowed to stand, will have far-reaching implications for the concept of federalism and the administration of justice.

II.

Nelson reverses a rule long followed by state and federal courts. Indeed, the Virginia rule is identical to that enunciated so cogently and frequently by the Court below before its change of thinking in *Nelson*.

In *Magee* v. *Peyton*, 343 F.2d 433 (4th Cir. 1965), the evidence revealed that after the trial defendant and his father, in their conversations with original counsel, were informed that there would be no new trial or appeal without appropriate payment for future services; they wrote the trial court regarding a new trial and requested the appointment of counsel because of financial inability to retain an attorney. The letters went unanswered. The Fourth Circuit Court held that the request for an appeal had been ignored and concluded that Magee had been denied the assistance of counsel on appeal.

While the request for an appeal was evident in *Magee*, the sole question in *Allred* v. *Peyton*, 385 F.2d 360 (4th Cir. 1967) was whether Allred properly asserted his right to an attorney in seeking an appeal. The District Court concluded in the affirmative after reviewing a letter from Allred to his attorneys with regard to their view of his case.

The District Court said that *Magee* controlled—that while there was no direct request for counsel the letter should be

construed as a request for an appeal. The Fourth Circuit agreed that there was no specific request for an appeal, but then declared that the letter's broad language could not be interpreted as a request for an appeal—even by a layman. According to the Fourth Circuit:

> Here the entire question is simply whether Allred made known his desire to appeal. Again, we think he did not. 385 F.2d at 362.

In an even earlier case, the record showed that the defendant desired an appeal and evidenced such a desire to court and counsel shortly after trial. His requests were ignored. The Fourth Circuit affirmed the lower court's conclusion that the disregarding of the defendant's request denied him the same appellate review *afforded others upon request. Boles* v. *Kershner,* 320 F.2d 285 (4th Cir. 1963). (Emphasis supplied.) See, also, *Williams* v. *Coiner,* 392 F.2d 210 (4th Cir. 1968); *Turner* v. *North Carolina,* 412 F.2d 486 (4th Cir. 1968).

The above mentioned cases involved a determination of the existence of a request for an appeal. Implicit was the rule that some request must be made. While the Court below attempted to separate the issue in *Nelson* from those of prior cases (see 415 F.2d at 1156), the truth is that as recently as a matter of *months before Nelson, all seven members of the Court rejected the very reasoning now promulgated in Nelson.* For example, in *Conners* v. *Peyton,* mem. dec. no. 12,157 (4th Cir. December 18, 1968) one of the issues placed squarely before that Court was "the denial of the right to appeal because he [defendant] was not advised of this right." No. 12,157 at 2-3. The issue was rejected by the Court (Boreman, Bryan, Winters, JJ) as being without merit:

> . . . since there was no showing other than the bare fact that he was never advised of right to appeal. . . .

> And the apparent failure of the petitioner to ask his retained counsel to appeal his conviction further reveals the lack of merit in this asserted ground for relief. . . . *Conners* v. *Peyton, supra* at 2-3. (A copy of this opinion is included in the Appendix at p. 72.)

Morgan v. *Peyton,* mem. dec. no. 12,337 (4th Cir. December 6, 1968) put to the Court below the direct question of whether petitioner "was denied his right to appeal but because his attorney failed to inform him that he could appeal." *Morgan* v. *Peyton, supra* at 2. That Court (Haynsworth, Craven, Butzner, JJ) denied the claim, saying, in effect, that petitioner was not entitled to such advice in the absence of dissatisfaction on his part with the trial or its results. (*Morgan* v. *Peyton, supra,* is found herein as Appendix XIII-B, p. 76.)

In another case, the issue of the right to appeal was decided, although it was not even fully developed at the District Court level; the Court (Haynsworth, C.J., Craven, Butzner, JJ) dismissed the claim of denial of appeal with language that could not have been more explicit:

> It is clearly settled law that a state criminal defendant may not be denied his right to appeal because of his indigency. Not yet, however, is a state prisoner relieved of the burden of making his wish for an appeal known—however ineptly. It is only in the federal court and then only with respect to the defendants tried on a plea of *not* guilty that the trial judge must advise the defendant of his right of appeal. *Fed. R. Crim. P.* 32(a)(2). We held in *Allred* v. *Peyton,* 385 F.2d 360 (4th Cir. 1967) that *a state prisoner may not claim a denial of his right to appeal as a basis for federal habeas corpus relief unless he shows that he desired an appeal and in some way made that desire known, either to his attorney or to the trial court.* . . . There is nothing in the record of the present case to indicate that Sand

> ever wanted, sought or made known to anyone a desire for an appeal. . . . Under these circumstances, he cannot claim a denial of his right to appeal. *Sand* v. *Peyton,* mem. dec. no. 12,647 at 2 (4th Cir. October 2, 1968). (Emphasis supplied.) (A copy of this decision can be found at App. p. 58.)

After *Sand* the Court below considered another case, just prior to its ruling in *Nelson,* in which one of the allegations raised the question of denial of appeal by his "appointed attorneys." *Smith* v. *Peyton,* mem. dec. no. 12,265 (4th Cir. November 15, 1968). Smith claimed that he was never advised by his attorneys with regard to an appeal. The Fourth Circuit (Haynsworth, C.J., Sobeloff, Butzner, JJ) dismissed the claim in unmistakable language:

> . . . We have previously held that a defendant must make his desire for an appeal known to court or counsel in some manner, however halting or inept, before an affirmative obligation arises on the part of counsel to inform him of his right to an indigent's appeal. *Where he fails to indicate in any manner that he wishes to appeal he cannot claim that he was denied his right to appeal because counsel failed to inform him of his right. Allred* v. *Peyton,* 385 F.2d 360 (4th Cir. October 2, 1968). . . . *Smith* v. *Peyton, supra* at 2-3. (Emphasis supplied.)[4]

Examination of the indexed records of similar cases partially catalogued since 1967 in the Clerk's office of the United States Court of Appeals for the Fourth Circuit reveals numerous decisions adhering to *Allred, et al.*; all are directly contrary to the rule now proclaimed in *Nelson.*[5]

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[4] See App. XIII-D, Copy of *Smith* v. *Peyton* opinion.

[5] See, for example, *Wade* v. *Peyton,* mem. dec. no. 11,507 (4th Cir. March 11, 1968); *Austin* v. *Peyton,* mem. dec. no. 10,784 (4th Cir. April 21, 1967); *Griffith* v. *Maryland,* mem. dec. no. 10,893 (4th Cir.

The number of Virginia *habeas corpus* petitions denied upon the basis of *Allred, Webb, et al.*, is not easily ascertainable, but, presumably, *Nelson* now invites countless unsuccessful state and federal habeas supplicants to reopen and relitigate the appellate advice issue. The decision, in short, does injury to the delicate federal-state relationship and creates a new and unnecessary dichotomy in federal-state law in an already complicated and crowded area of litigation.

The Fourth Circuit, however, does not stand alone; the Circuit Court of Appeals for the Tenth Circuit has held that because defendant was not advised of his appellate remedies, he was denied an appeal. *Wynn* v. *Page*, 369 F.2d 930 (10th Cir. 1966).

The Second Circuit Court of Appeals has recently held—in a sharply divided (4-3) opinion—that *Douglas* v. *California, supra*, imposes on the states an affirmative duty to warn every person convicted of crime of his right to appeal and his right to do so without personal expense by court-appointed counsel if he is indigent. *Smith* v. *McMann*, 416 F.2d 648 (2nd Cir. 1969).[6]

August 7, 1967); *Thacker* v. *Peyton*, mem. dec. no. 10,949 (4th Cir. June 6, 1968); *Brookman* v. *Peyton*, mem. dec. no. 11,141 (4th Cir. September 12, 1968); *Jackson* v. *Peyton*, mem. dec. no. 11,656 (4th Cir. March 26, 1968); *Grigg* v. *United States*, mem. dec. no. 11,817 (4th Cir. September 4, 1968); *Connors* v. *Peyton*, mem. dec. no. 12,157 (4th Cir. December 18, 1968); *Ginn* v. *Maryland*, mem. dec. no. 12,429 (4th Cir. December 17, 1968); *Robinson* v. *Peyton*, mem. dec. no. 12,627 (4th Cir. September 30, 1968); *Shenton* v. *Maryland*, mem. dec. no. 12,794 (4th Cir. November 12, 1968); *Coleman* v. *Peyton*, mem. dec. no. 12,714 (4th Cir. November 20, 1968); *United States* v. *Davis*, mem. dec. misc. no. 326 (4th Cir. June 28, 1967).

See, also, *Griffin* v. *Peyton*, 284 F.Supp. 650 (W.D. Va. 1968); *Davis* v. *Boles*, 247 F.Supp. 751 (N.D. W.Va. 1965); *Gibson* v. *Peyton*, 262 F.Supp. 574 (W.D. Va. 1966); *Elam* v. *Peyton*, 265 F.Supp. 231 (W.D. Va. 1967); *Dillon* v. *Peyton*, 288 F.Supp. 163 (W.D. Va. 1968); *Hall* v. *Peyton*, 299 F.Supp. 613 (W.D. Va. 1969).

[6] Note the particularly sharp dissent of Friendly, J. (with whom Lombard, C. J. and Moore, J. joined).

The Second Circuit in *Smith* openly acknowledged the reversal of its previous position as set forth in *United States ex rel Bjornsen* v. *LaVallee,* 364 F.2d 489 (2nd Cir. 1966), *cert. den.* 386 U.S. 988 (1967), *reh. den.* 387 U.S. 915 (1967), where it had stated previously:

> It would unquestionably have been commendable if the state had afforded such advice [citing authority]; but *The Constitution has not yet been held to require that such advice be furnished.* [Citing cases] 364 F.2d at 491. (Emphasis supplied.)

The law in the Circuit Court of Appeals for the Seventh Circuit, however, is contrary to the recent rulings of the Second and Fourth Circuits. In *Victor* v. *Lane, supra,* the issue involved the allegation that defendant had been denied an appeal because he had not been advised of his right to appeal. The claim was rejected:

> Although most would agree that it is good practice for a trial court to inform a convicted defendant of his right to appeal, and to be furnished counsel if he is indigent, *the absence of such advice is not deemed a denial of due process or equal protection.* (Emphasis supplied.) 394 F.2d at 269-70.

See, also, *United States ex rel Green* v. *Pate,* 411 F.2d 884 (7th Cir. 1969).

Before this Court amended the Federal Rules of Criminal Procedure, the Circuit Court of Appeals for the District of Columbia followed the Virginia rule. *Hodges* v. *United States,* 282 F.2d 858 (D.C. Cir. 1960). In addition, it would appear that the rule of the Circuit Court of Appeals for the Fifth Circuit is that the trial court must have knowledge that the defendant wishes to appeal and that he is indigent. *Harris* v. *Beto,* 392 F.2d 191 (5th Cir. 1968); *Worts* v. *Dutton,* 395 F.2d 341 (5th Cir. 1968); *Pate* v.

Holman, 341 F.2d 764 (5th Cir. 1965), later modified in 345 F.2d 546 (1965); *Ryan* v. *Louisiana,* 282 F.Supp. 378 (E.D. La. 1967).

CONCLUSION

Petitioner submits that the decision below should be reviewed because it erroneously elevates a federal procedural rule to one of Constitutional meaning binding upon state criminal procedures; it is in conflict with decisions of other Circuit Courts of Appeals, and it raises issues that have not been—but should be—settled by this Court. *U.S.S.Ct.R.* 19.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Reno S. Harp, III, Assistant Attorney General of Virginia, a member of the bar of the Supreme Court of the United States and one of counsel for the Petitioner in the captioned matter, do hereby certify that on this 6th day of February, 1970, I mailed a copy of the foregoing Petition for Writ of Certiorari by first-class mail to Frank W.

Hardy, Esquire, and Daniel E. Rogers, II, Esquire, Attorneys at Law, Williams, Mullen and Christian, 510 United Virginia Bank Building, Richmond, Virginia, counsel for the respondent herein. All parties required to be served have been served.

RENO S. HARP, III
Assistant Attorney General of Virginia